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CIRCUIT COURT OF BEDFORD COUNTY.

LIBERTY SAVINGS BANK V. OTTERVIEW LAND COMPANY.

August 14, 1903.

STATE TAXES—*Duration of lien—Right to collect.* Though the lien for taxes and levies on real estate ceases after five years, the right to collect them does not. Where a sale has been made to the state for delinquent taxes within five years after accrual, title to the property sold vests in the state even though such sale was defective, and in the distribution of the proceeds of a judicial sale, the delinquent taxes will be first paid.

J. S. Diggs and F. W. Whitaker, for complainant.

Graham Claytor, for defendant.

Creditor's suit to subject property of defendant to payment of its debts. A special decree for an account of tax liens and levies, with their priorities, having been entered, the commissioner reported that certain alleged tax sales were null and void and that the state had no lien which could be enforced against the land. The court sustained the report so far as it declared the tax sales null and void, but nevertheless held that the claim of the state was not barred of its right to collect the taxes, the opinion being as follows:

HON. J. R. TUCKER, Circuit Judge:

"I have reached the following conclusion in this case: The tax sale may be set aside and deeds made to the purchasers. I am of opinion that the Commonwealth is entitled to have its taxes paid first. Without going into an elaborate discussion of the question, I am satisfied from the statutes relating to the collection of taxes, that if there has been a sale to the state within five years after accrual of the taxes, title to the property vests in the state. If this is so, while the lien as such may have ceased, the state's right to collect the taxes still remains. See *Haythe v. Patteson*, 2 Va. Law Reg. 563."

From the decree of August 14, 1903, embodying these views, a petition for appeal to the Supreme Court of Appeals of Virginia was presented by Messrs. J. Singleton Diggs and F. W. Whitaker, attorneys for the National Bank of the Republic. The following extract from their petition is made:

"Section 636 of the Code provides:

'There shall be a lien upon all real estate for the tax assessed and county, city and town levies assessed thereon with interest upon such taxes and levies from the 15th day of December in the year in which the same may have been assessed for the period of five years, unless sooner paid.'

"Bearing in mind the well established law that the state derives its lien by virtue of the statute, that the extent of its lien is as prescribed, that all tax laws must be construed strongly against the state in favor of the owner, it is manifest that the foregoing statute fixed a period, to-wit: five years, when all liens for taxes due the state, and all county, city and town levies shall cease. The state only gets its lien by virtue of this statute and its lien exists and continues only as prescribed therein.

"By Acts of the Legislature prior to 1887, running back to 1840, and further, the state was given a perpetual lien for its taxes. A brief review of these acts and a comparison of them with section 636 of the Code will demonstrate that the effect of sec. 636 is to put a limit of five years to the lien of the state for its unpaid taxes.

"Acts 1840, p. 29: 'There shall be a lien on all real estate for the taxes assessed thereon from the 15th day of December in the year in which the same may be assessed, until payment thereof.' Code of 1860, p. 217, provides the same. Code of 1873, p. 380, sec. 4, has the same provision. Acts 1885-6, p. 411, sec. 4, provides that the lien shall continue '*for the period of five years, or until payment thereof.*' The insertion of the clause '*for the period of five years*' does not change the perpetual lien, for the following qualifying phrase '*or until payment thereof*' gives the state a lien until the taxes are paid, the practical effect of the act being that the unlimited lien fixed by the previous acts was unchanged.

"But a material change appears in 636 of the present Code which would suggest that it was the intent of the legislature to fix a period at which the lien of the state should cease. 'There shall be a lien,' says the statute, 'upon all real estate . . . from the 15th day of December in the year in which the same may have been assessed, for a priod of five years, unless sooner paid.' There can be no doubt that this statute limits the lien of the state for its unpaid taxes to five years, otherwise why insert '*for a period of five years*' in the statute? The act of 1885-6, *supra*, evidently intended to fix this

five year limit, but in some way the concluding phrase of the sentence 'or until payment' was so worded as to defeat the legislative intent. If the legislature intended that the lien should be without limit it was wholly unnecessary to change the language of the statute as it existed prior to the act of 1885-6, and the present section of the Code, by amending the section so as to read: 'for a period of five years.'

"The Code carried into effect the intent of the legislature of 1885-6 by re-enacting the same statute, but substituting for 'or until payment' the language as it exists in section 636, 'unless sooner paid.' The phrase 'unless sooner paid' is without effect except to emphasize the fact that the lien of the state ceases after five years.

"If the state had perfected its lien by a valid tax sale, then, the five year limit would not apply. But if the sales are defective and declared null and void, then, as a matter of law, there has been no sale and the lien is lost by the lapse of the five years provided in the statute.

"It is by virtue of the statute that the lien for taxes is established and the state can claim no other. The state cannot go one step further than the statute provides. The same statute that fixed the lien limits the existence of the lien it created to a period of five years from the 15th of December, in the year in which the taxes were assessed.

"In the case under consideration the last assessment was in the year 1896, and the statute began to run from the 15th day of December in that year. The state did not assert its claim for its taxes, except by a defective sale, until March, 1902, and five years having elapsed between the 15th day of December, 1896, and March, 1902, the state has lost its lien."

The petition for appeal was on the first day of December, 1903, by the court at Richmond,

Denied.

EDITORIAL NOTE —No question of limitations as to state taxes can now be raised, section 174 of the Constitution of 1902 being as follows: "After this Constitution shall be in force, no statute of limitation shall run against any claim of the state for taxes upon any property; nor shall a failure to assess property for taxation defeat a subsequent assessment for and collection of taxes for any preceding year or years, unless said property shall have passed to a *bona fide* purchaser for value, without notice; in which latter case the property shall be assessed for taxation against such purchaser from the date of his purchase."